No. 20-1381

IN THE

Supreme Court of the United States

MATTHEW FOX, PROSECUTING ATTORNEY, MERCER COUNTY, OHIO; JEFF GREY, SHERIFF, MERCER COUNTY, OHIO; AND J.K., CRIME VICTIM,

Petitioners,

v.

CHARLES SUMMERS,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

Ten years ago, this Court acknowledged division among state and federal courts about the existence and scope of a constitutional right to informational privacy, but "le[ft]" the question "for another day." *See Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 146 n.9, 148 n.10 (2011). That day has come.

Following *Nelson*, courts have deeply fractured over whether there is a constitutional right to privacy regarding intimate sexual information. The Second, Third, Sixth, and Ninth Circuits recognize such a right and hold that officials cannot disclose private sexual information unless the government's interests in disclosure outweigh the individual's interest in privacy. By contrast, the Ohio Supreme Court rejected the existence of any constitutional right to informational privacy in this case. And the Eighth, Tenth, and D.C. Circuits have made clear that they will not recognize a constitutional right to informational privacy.

Uncertainty and division about the confidentiality of intimate details of sexual crimes is unacceptable, for both victims and government officials. It is particularly intolerable because officials in Ohio are caught in the crosshairs of conflicting obligations: The Ohio Supreme Court ordered Fox and Grey to disclose information that, under Sixth Circuit law, they must protect. Only this Court can resolve the conflict.

Respondent disputes none of this. Instead, he claims that the decision below does not implicate the split, this case is a poor vehicle for resolving it, and Petitioners' position on the merits is unworkable. Each argument hangs on the flawed premise that the records Respondent seeks are already "public"

because J.K. testified at trial. But Respondent seeks materials that were never presented at trial; he is not content to be "stuck with [the] information the government present[ed] at a public trial." Opp. 17. Courts that recognize a right to privacy regarding sexual information reject Respondent's view that a victim opens the door to publicizing *all* details of sexual abuse whenever she speaks publicly about *some* details. The Court should grant certiorari.

ARGUMENT

I. THERE IS AN ACKNOWLEDGED SPLIT ABOUT THE EXISTENCE AND SCOPE OF A CONSTITUTIONAL RIGHT TO PRIVACY REGARDING INTIMATE SEXUAL INFORMATION

A. The Ohio Supreme Court Ordered Petitioners To Release Materials That The Sixth Circuit Holds They Must Protect

In response to Respondent's public records request, the Ohio Supreme Court ordered Fox and Grey to release intimate details of sex crimes committed against J.K. Ohio's public records law expressly exempts records whose release is prohibited by federal law, Ohio Rev. Code Ann. § 149.43(A)(1)(v) (LexisNexis 2020), but the court rejected Petitioners' argument that the U.S. Constitution prohibits them from publicly releasing intimate details of a sex crime without a sufficiently compelling government basis. *See* Pet. App. 18a-19a. That holding directly conflicts with Sixth Circuit precedent and creates a catch-22 for government officials throughout Ohio by requiring them to do something that exposes them to suit in federal court. *See Bloch v. Ribar*, 156 F.3d 673, 686-87 (6th Cir. 1998).

The plaintiff in *Bloch* was raped by an unknown assailant and promptly reported it to authorities. *See id.* at 676. When 18 months passed "with no apparent progress in the investigation," she publicly criticized the local sheriff. *See id.* The sheriff responded with a press conference in which he announced a grand-jury investigation of the rape and disclosed "highly personal and extremely humiliating details of the rape"—details "that were so embarrassing [that the victim] had not even told her husband." *Id.* The victim sued the sheriff under 42 U.S.C. § 1983, claiming that he violated her constitutional right to informational privacy. *Bloch*, 156 F.3d at 676-77.

The Sixth Circuit agreed. It held that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical [sic] purpose is being served." *Id.* at 686. Absent a compelling government interest in the release of the information (such as prosecuting or investigating a crime), the victim's privacy interest prevails. *See id.* Although *Bloch* granted qualified immunity to the sheriff because the contours of the right were not clearly established, the court warned that "public officials in this circuit will now be on notice that such a privacy right exists." *Id.* at 687.

B. The Conflict Between The Ohio Supreme Court And The Sixth Circuit Is Part Of A Deeper Split About The Constitutional Right To Privacy Regarding Sexual Information

More than 40 years ago, this Court described "the individual interest in avoiding disclosure of personal matters" as an element of the "constitutionally protected 'zone of privacy.'" *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977); *see Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977). Many courts interpreted *Whalen* and *Nixon* to recognize a constitutional right to informational privacy, *see Nelson*, 146 n.9; Pet. 10, but the Court clarified in 2011 that both cases merely "assume[d]" the existence of "a privacy interest of constitutional significance," *Nelson*, 562 U.S. at 147. *Nelson* declined to "provide a definitive answer to the question whether there is a constitutional right to informational privacy." *See id.* at 147-48 & n.10.

Following *Nelson*, courts nationwide have divided about the existence and scope of a constitutional right to privacy regarding intimate details of sexual activity and abuse.

1. At least four circuits have doubled down on their pre-*Nelson* holdings that the Constitution protects private sexual information.

The Sixth Circuit still cites *Bloch* for the constitutional right to shield information "of a sexual, personal, and humiliating nature" and explicitly has declined "to revisit" the issue in light of *Nelson*. *Lee v. City of Columbus*, 636 F.3d 245, 260 & n.8 (6th Cir. 2011); *see also Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 586 (6th Cir. 2012).

The Second, Third, and Ninth Circuits likewise continue to recognize a constitutional right protecting intimate sexual information. In *Thorne v. City of El Segundo*, the Ninth Circuit held that a police department's inquiries about a job applicant's "possible pregnancy and abortion and the identity of [her] sexual partners" violated the applicant's constitutional right to privacy. 726 F.2d 459, 470-71 (9th Cir. 1983). And in *Powell v. Schriver*, the Second Circuit recognized a constitutional "right to maintain the confidentiality of one's transsexualism" and HIV-positive status. 175 F.3d 107, 110-11 (2d Cir. 1999). Similarly, in *Sterling v. Borough of Minersville*, the Third Circuit held that a police officer's threat to disclose a teenager's sexual orientation violated the "clearly established" constitutional right protecting "matters of personal intimacy." 232 F.3d 190, 192 (3d Cir. 2000).

As in the Sixth Circuit, of course, this right is "not absolute," *id.* at 195; rather, these courts balance the government's interest in disclosure against the individual's interest in privacy, *see Hancock v. Cnty. of Rensselaer*, 882 F.3d 58, 65 (2d Cir. 2018); *Sterling*, 232 F.3d at 196; *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *Bloch*, 156 F.3d at 686. And like the Sixth Circuit, each court continues to recognize the constitutional right to privacy regarding sexual information in the wake of *Nelson*. *See, e.g.*, *Endy v. Cnty. of L.A.*, 975 F.3d 757, 768 (9th Cir. 2020); *Hancock*, 882 F.3d at 65; *Malleus v. George*, 641 F.3d 560, 565 (3d Cir. 2011).

Other courts also recognize a constitutional right regarding the privacy of intimate sexual information, though they have not revisited the question following

Nelson. *See, e.g.*, *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991) (clearly established constitutional interest "in avoiding disclosure of personal matters" protected videotape depicting sexual activity); *In re Agerter*, 353 N.W.2d 908, 914 (Minn. 1984) (constitutional right to informational privacy precluded official inquiries into judge's "private sex life"); *cf. Fadjo v. Coon*, 633 F.2d 1172, 1174 (5th Cir. 1981) (recognizing constitutional right to privacy regarding "the most private details of [one's] life").

2. By contrast, the Ohio Supreme Court and three circuits refuse to recognize a constitutional right to informational privacy.

In the decision below, the Ohio Supreme Court flatly rejected a constitutional right to privacy. Pet. App. 19a. It did not evaluate the government interest in disclosing intimate details of J.K.'s sexual abuse, much less consider whether that interest outweighs J.K.'s privacy rights.

Similarly, the D.C. Circuit has said that it "would conclude with little difficulty that such a right does not exist." *Am. Fed'n of Gov't Emps., AFL-CIO v. Dep't of Hous. & Urb. Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997); *see id.* (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information").

Other courts that once recognized a constitutional right to privacy regarding intimate information have retreated from that position after *Nelson*. In 2006, the Tenth Circuit recognized a clearly established constitutional right protecting against "unwelcome disclosure of private sexual information." *Anderson v. Blake*, 469 F.3d 910, 915 (10th Cir. 2006) (denying

qualified immunity to police officer who released video depicting alleged rape). But in the wake of *Nelson*, that court held that "the existence of [a right to informational privacy] is an open question." *Leiser v. Moore*, 903 F.3d 1137, 1141 (10th Cir. 2018).

Likewise, the en banc Eighth Circuit acknowledged that it previously had embraced a right to informational privacy, but held that *Nelson* left the status of that right "uncertain[]." *Dillard v. O'Kelley*, 961 F.3d 1048, 1053-54 (8th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 1071 (2021). The court accordingly granted qualified immunity to officials who released files regarding sexual abuse of minors, including "full descriptions of the victim interviews." *Id.* at 1051, 1055.

C. This Case Squarely Implicates The Split

Respondent does not dispute this split. Instead, he says that it is not implicated here because J.K. publicly testified about her abuse and there is an unspecified "penological purpose" for his requests. Both arguments fail.

Bloch repudiates Respondent's assumption that *any* public reference to sexual conduct opens the door to publicizing *every* detail. Even though the victim in *Bloch* had spoken to the media about her rape and the sheriff had publicly announced a grand-jury investigation, the right to privacy shielded additional details from disclosure. 156 F.3d at 676, 686; *see also Anderson*, 469 F.3d at 915 (rejecting argument that would "exclud[e] from privacy protection any otherwise personal information that contains evidence of criminal conduct").

Here, Respondent seeks materials that were never presented at trial, including audio and video recordings. His claim that those unpublicized records became "public" because they relate to a "public accusation[]," "public investigation," or trial, Opp. 3, 17, conflicts with *Bloch*'s holding that public disclosure of some details does not forfeit the constitutional right to privacy with respect to *all* details. *See Bloch*, 156 F.3d at 686.

Respondent's insistence that there is a "penological purpose" behind his records requests fares no better. Opp. 9. Whatever he means by that phrase, the Ohio Supreme Court failed to balance any such interest against J.K.'s privacy rights. *See* Pet. App. 19a. Neglecting to even ask that question conflicts with the holdings of the Second, Third, Sixth, and Ninth Circuits.

II. THE PETITION IS AN IDEAL VEHICLE FOR ADDRESSING THIS IMPORTANT QUESTION

A. Uncertainty regarding the privacy rights of victims of sexual crimes is unacceptable. "[A] historic social stigma has attached to victims of sexual violence." *Bloch*, 156 F.3d at 685. "Releasing the intimate details of rape [and other sexual assaults] will … not only dissect a particularly painful sexual experience, but often will subject a victim to criticism and scrutiny concerning her sexuality and personal choices regarding sex." *Id.*

Sexual assault crimes, especially against children, are already dramatically underreported. *See* Pet. 19-20. The prospect of intimate details of an assault being released to the public, particularly in the age of social media, will only further discourage victims from coming forward. Those who do will face a more

difficult path to healing if their humiliation and abuse are publicized. *See* Pet. 19-21. A victim's decision to report a crime, or ability to heal after doing so, should not depend on geography.

This case is an ideal vehicle for resolving the split. Many cases implicating the right to privacy regarding intimate sexual information are poor cert candidates because they arise in the context of qualified immunity. *See, e.g.*, *Dillard*, 961 F.3d at 1055, *cert. denied*, 141 S. Ct. 1071 (2021). Here, however, the validity of the Ohio Supreme Court's order hinges on whether federal constitutional law restricts officials from releasing intimate personal details of a sexual assault without a sufficiently weighty government interest. In resolving that question, the Court has the benefit of hearing from both the victim and the prosecutors.

B. Respondent's contrary arguments are unavailing.

First, Respondent tries to undermine the importance of J.K.'s privacy because she was no longer a minor by the time her abuser was tried and convicted. But all victims grow up. Whether they have privacy and space to heal along the way depends on this Court's guidance. And while Respondent insists that there is no urgent need for review, the recently denied petition he cites did not involve informational privacy at all; the plaintiffs claimed a "fundamental right to bodily privacy" in school locker rooms. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1222 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020).

Second, Respondent argues that the case is moot because Fox and Grey previously claimed that he already has most of the materials he requested. While

Petitioners advanced that argument below, the Ohio Supreme Court correctly concluded that Petitioners have no way of knowing which materials Respondent received from a third party, who received them from a government official in a different county. *See* Pet. App. 27a. Respondent *himself* vigorously denied receiving everything he requested, and even moved for sanctions against Petitioners for "attempt[ing] to assert that the case is moot." Brief of Summers at 24, *Summers v. Fox*, No. 2018-0959 (Sup. Ct. Ohio); *see also* Summers' Response to Privilege Assertion at 9, *Summers v. Fox*, No. 2018-0959 (Sup. Ct. Ohio) (arguing that Summers has not received various items, including video and audio recordings and witness statements). Even now, Respondent does not say that he has received everything, and his opposition brief demonstrates his stake in enforcing the Ohio Supreme Court's judgment.

Finally, Respondent claims that Petitioners lack standing because J.K. has no right to informational privacy, and Fox and Grey could not assert J.K.'s right even if it existed. But "standing is not defeated by failure to prevail on the merits." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531 (3d ed. 2008). Moreover, J.K.'s standing is irrelevant because she seeks the same relief as Fox and Grey, *see Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), who have standing to appeal an order requiring them to act in a manner that they believe violates federal law, *see I.N.S. v. Chadha*, 462 U.S. 919, 930 (1983). And Article III's standing requirement "had no bearing upon [Fox's and Grey's] capacity to assert defenses" before the Ohio Supreme

Court. *Bond v. United States*, 564 U.S. 211, 217 (2011).

III. THE DECISION BELOW IS WRONG

A. The Ohio Supreme Court joined the wrong side of the split.

Balancing an individual's interest in avoiding disclosure against the government's interest in releasing information helps safeguard the 14th Amendment right to privacy. *See, e.g.*, *Anderson*, 469 F.3d at 914-15; *Sterling*, 232 F.3d at 193-96; *Powell*, 175 F.3d at 111-12; *Bloch*, 156 F.3d at 685-86; *Thorne*, 726 F.2d at 468-69. That right would be seriously curtailed if the government could publicize private sexual information without a sufficiently compelling reason—especially when publication will subject a person to harassment, shame, and humiliation. *See Anderson*, 469 F.3d at 914-15; *Sterling*, 232 F.3d at 195-197; *Powell*, 175 F.3d at 111-12; *Bloch*, 156 F.3d at 685; *Thorne*, 726 F.2d at 470-71. Indeed, "the protection of minor victims of sex crimes from further trauma and embarrassment is a compelling [interest]." *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (citation omitted).

The Ohio Supreme Court saw no need to identify a government interest justifying the disclosures it ordered, much less consider whether that interest justifies the release of unredacted, intimate details regarding sexual abuse of a minor.

B. Respondent claims that this Court's cases reject Petitioners' position, but *Nelson* made clear that the existence and scope of a right to informational privacy is an open question. *See* 562 U.S. at 147 & n.10. Moreover, although the Court upheld the disclosures in *Whalen*, *Nixon*, and *Nelson*, it did so

only after determining that a weighty government interest was at stake and the information was "shielded by statute from unwarranted disclosure." *Id.* at 151, 155-56 (citation omitted); *see Nixon*, 433 U.S. at 462; *Whalen*, 429 U.S. at 597-98, 605.

Nor is Petitioners' position inconsistent with *Paul v. Davis*, 424 U.S. 693, 713 (1976), which rejected a privacy claim arising from publicizing the fact of an arrest. *Paul* does not address the sort of materials at issue here, including audio and video recordings that were not played at trial. *Cf. Nixon*, 433 U.S. at 459 (distinguishing between "documents and tape recordings" that President Nixon disclosed to the public and "extremely private communications" with his family and friends). Respondent's reliance on cases regarding the Sixth Amendment right to a public trial is thus misplaced. *See* Opp. 19.

Finally, Respondent claims that denying his requests would hamper the public interest in vindicating wrongfully convicted persons. But Respondent's requests have nothing to do with vindicating his son through the court system; indeed, Respondent's son exhausted his appellate remedies before Respondent submitted his records requests. *See* Opp. 6. Moreover, the Ohio Rules of Criminal Procedure afford defendants and their counsel an opportunity to obtain materials necessary to their defense while safeguarding any privacy interests. *See* Ohio R. Crim. Proc. 16. Respondent does not contend that those procedures fell short here.

CONCLUSION

The Petition for Certiorari should be granted.

May 18, 2021

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